No. 281

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IN THE

Supreme Court of the United States

October Term, 1961

IN THE MATTER OF THE APPLICATION

OF

ARTHUR MURRAY, INC.,

Petitioner-Appellant,

For an Order Staying Arbitration Proceedings Instituted by

RICCIARDI,

Appellee.

PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the United States Supreme Court:

Petitioner herein prays for a Writ of Certiorari to review the order of the Court of Appeals of the State of New York, affirming the order of the Appellate Division of the Supreme Court of the State of New York, First Department, which in turn affirmed an order of the New York Supreme Court, County of New York, denying appellant's motion for an order staying proposed arbitration proceedings before the American Arbitration Association, pursuant to demand therefor made by the appellee.

Opinions

The Court, at Special Term, of the Supreme Court of the State of New York, County of New York, in denying the motion, rendered an opinion, set out in the appendix herein. The Appellate Division of the Supreme Court, in affirming the Court below, gave no opinion. The Court of Appeals of the State of New York affirmed by a divided Court of 5 to 2. The majority, in affirming, issued a memorandum indicating that the affirmance was upon the basis of a case recently decided by it, while the minority wrote an opinion for reversal and the granting of appellant's motion. Such opinions are appended herewith and have not yet been officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Sec. 1257(3) and Sec. 344c.

Question Presented

The order sought to be reviewed was dated and entered in the office of the Clerk of the Court of Appeals of the State of New York on May 31, 1961. The question presented thereunder is as follows:

Whether the appellant was deprived of the constitutional guarantees afforded him by the Fifth Amendment and the Fourteenth Amendment (Sec. 1) in that it may be deprived of property without due process of law.

Constitutional Provision Involved

Amendment V of the Constitution of the United States, insofar as applicable to this case, provides as follows:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Amendment XIV of the Constitution of the United States, insofar as applicable to this case, provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property without due process of law * * *."

Statement

(Page reference is to transcript of record.)

Reasons for Granting the Writ

As is indicated by the minority opinion in the Court of Appeals of the State of New York, a judicial interpretation of the language of the contract specifically forbids any assignment thereof by appellee and places no obligation or duty on appellant's part to permit or consent to an assignment (46). Reading the contract in its entirety, the agreement to arbitrate any dispute can only mean a *factual dispute* which arises with respect to any matter connected with the contract and a right or obligation stemming therefrom. Where the contract peremptorily forbids the assignment, there can be no claim that there was a consent to arbitrate any factual dispute in conjunction with the right to assign. The majority of the Court of Appeals did not dispute the statement of

the minority as to the non-assignability of the contract, but ruled that where there is a provision to arbitrate, any and all questions of law or fact raised by the demand for arbitration must be left to the arbitrators, even though there might be no cause of action at law which could be based thereon.

The constitutional guarantees of petitioner were definitely violated in that it was directed to submit to the determination of a non-judicial tribunal, neither authorized by law nor contractually agreed upon, and any adverse finding by such body, under which appellant would be required to make payment of damages, would be a deprivation of its property without due process of law.

Argument

The law of New York State is firmly established that a provision against assignment, such as we have before us, is absolute and unconditional and imposes no obligation on the part of appellant. The majority of the Court, in affirming, did not dispute the interpretation placed thereon by the minority opinion, but was explicit in resting its decision upon *Matter of Exercycle Corporation*, 9 N. Y. 2nd 329, decided March 23, 1961, copy of which is appended hereto. Special Term, in denying the motion, did so on the basis that claim was made that consent was withheld arbitrarily and unlawfully, and that good faith was an element which attached to every contract, and hence presented an issue of fact for the arbitrators. The Court of Appeals was specific in rejecting this claim, and resting its decision upon its reasoning in the *Exercycle* case. In that case, contention was made that there could be no arbitration because the contract was void for lack of mutuality. The Court of Appeals ruled:

> "In our view, the question whether the contract lacked mutuality of obligation * * * is to be determined by the arbitrators, not the Court."

The part which we deem pertinent to our case reads as follows:

> "Whether the issue is one involving interpretation or law or fact or all three, it is for the arbitrators * * *."

Three Judges dissented from this holding, in two separate opinions. In disagreeing, Judge Froessel quoted Chief Judge Cardozo (later a member of this court) in *Finsilver, Still & Moss* v. *Goldberg, Maas & Co.*, 253 N. Y. 382, 390-391:

> "If in truth there is no contract at all or none calling for arbitration, the self-constituted tribunal is a nullity without power to bind or loose by force of its decisions. * * * In the absence of a contract expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation."

We contend that by its decision, the Court of Appeals for the first time, injected into this case the constitutional issue of whether, notwithstanding that there is no agreement to arbitrate questions which do not exist in law, one may be compelled to be bound by the possibly misconceived notions of a non-judicial body as to the law. Hitherto, only questions of fact or mixed questions of law and fact could be submitted for arbitration, but the factual question always remained paramount. Now, for the first time, apparently, the Court divests itself of the determination of pure law questions, not intertwined with any fact determination, and remits them to the arbitrators for decision. The agreement to arbitrate did not contemplate any such disposition.

Section 1449 of the Civil Practice Act of New York expressly provides:

> "A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereon be in writing, and subscribed by the party to be charged therewith, or by his lawful agent."

We contend that the New York Court of Appeals has interpreted this statute so as to require arbitration, if (1) there be a general agreement to arbitrate any controversy, notwithstanding that there is no existing controversy between the parties, and that this is in violation of due process. It is clear that at common law, no court could compel arbitration, and that any right or authority which the court assumes, must grow out of statutory mandate. Hence, the decision must be read together with the statute, as an interpretation of its language.

The New York Court of Appeals earlier held in *Alpert v. Admiration Knitwear Co.*, 304 N. Y. 1, that if under the unambiguous terms of agreement calling for arbitration, there has been no default, the Court may not make an order compelling a party to proceed to arbitration. Its opening sentence reads:

> "We are to determine whether in the commercial transaction which gave rise to this proceeding there remains between the parties an arbitrable dispute. That question is one of law."

We urge that the Court was correct in this statement and that, insofar as the *Exercycle* case undertakes to implicitly overrule it by directing that all issues of law must be left

to the arbitrators, it not only is erroneous, but prejudicial to appellant's constitutional rights. In *Schafran* v. *Lowenstein*, 280 N. Y. 164, the New York Court of Appeals itself asked:

> "If the plaintiff made no contract to submit, or signed and executed no submission to arbitrate how, by any possibility, can it be bound by an award of arbitrators who had no jurisdiction?"

A parallel case was presented in *Bolhinger* v. *National Cash Register Co.*, 280 App. Div. 751 (N. Y.), wherein the contract was held to have placed no restriction on the right of discharging an employee and yet the employee sought to arbitrate the question of his discharge. Said the Court:

> "As there was no restriction on the right of appellant to discharge, there was no violation of any obligation owed to any employees when such right was exercised in this case. No obligation having been violated, there can be no dispute and, consequently, there is nothing to arbitrate."

In order to demonstrate the accepted rule, prior to the decision in the Exercycle, we refer to *Application of Minkin*, 279 A. D. 226, Affd. 304 N. Y. 617. The Appellate Division of the New York Supreme Court there stated:

> "Arbitration may be resorted to only to settle controversies. If no issue of fact or law exists in relation to a matter sought to be submitted to arbitration, there is, obviously, no controversy to be settled, and the matter is not one which may be comprised within an agreement to arbitrate."

This clearly paraphrases our position. As a matter of law, there is no basic case. The agreement to arbitrate

contemplated only valid disputes. Its purpose is to substitute the Board of Arbitrators in place of the judicial body, when there would be a matter in dispute of which the judicial body would otherwise have taken cognizance. It is in this sense that we stated heretofore that the entire agreement must be read together and that where it is absolute against the privilege of assignment, no dispute can arise and hence there was no agreement to arbitrate the same.

As it stands, appellant is now in the position of being absolutely bound by any decision of the arbitrators, no matter how erroneous in law or fact, subject only to the limitations of Section 1462 of the Civil Practice Act of the State of New York, which mandates the Court to vacate the award upon showing of corruption, fraud or undue means, or evident partiality or where there is an unreasonable refusal of postponement of the hearing without sufficient cause or a refusal to hear pertinent and material testimony or where the arbitrators exceeded their powers or so imperfectly executed them that a definite award was not made. The courts of New York in innumerable cases have reached the conclusion stated in *Shirley* v. *American Silk Mills*, 257 A. D. 375.

> "An arbitration award which a party may regard as unfavorable or of which he disapproves may not be impeached because of mistake or error of the arbitrators as to the law or facts in the absence of fraud, corruption or other misconduct. * * * Were the rule otherwise the judgment of the Court would be substituted in place of the award of arbitrators chosen by the parties and it would make an award the commencement, not the end, of litigation, Burchell v. Marsh 58 U. S. 344, 349."

Thus, in a large sense, the determination of the arbitrators, no matter how unjust, is not subject to judicial review. Is this due process in a case where the parties have not agreed to arbitrate? Can a party be bound, in the absence of an explicit agreement on his part consenting thereto? This Court in *Pennoyer* v. *Neff*, 95 U. S. 714, 733, in deciding due process, said:

> "To give such proceedings any validity, there must be a tribunal, competent by its constitution—that is by the law of its creation—to pass upon the subject matter of the suit * * *.

This Court was speaking of a judicial tribunal established by the Constitution of the State. It needs no forceful argument to persuade one that a Board of Arbitrators is not such a duly constituted tribunal.

If there is any question as to this, we refer to *Burton* v. *Platter*, 53 Fed. 901, 904, wherein the Court cites Chancellor Kent (2 Kent Comm. 13) as follows:

> "The better and larger definition of due process of law is that it means law in its regular administration through Courts of jusice."

This Court had opportunity to discuss due process in *Davidson* v. *New Orleans*, 96 U. S. 97, 103:

> "* * * It is not possible to hold that a party has, without due process of law, been deprived of his property; when as regards the issue affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case."

In that case, the Court was considering the legality of a summary sale for unpaid taxes due to the State, after

the appellant had failed to avail himself of the rights given him by statute to test its validity by proper action.

If ours were a case wherein there could be a total review by the Court, our position would unquestionably not be as strong, but where we are deprived of all such rights and finality attaches to the findings of the arbitrators, due process is not present.

We ask the Court to review this case also because it presents an ideal factual situation for determination of the question, which seems to be plaguing both the Federal Courts as well as the State Courts. Thus, on April 10, 1961, the U. S. Circuit Court of Appeals, for the Second Circuit in *El Hoss Engineering and Transport Co.* v. *American Independent Oil Company* (No Off. Rep.) stated the position that:

> "The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness."

This followed the conclusion by the Court that

> "We read the entire contract as demonstrating a clear intent on the part of both parties not to arbitrate any dispute with reference to whether there was a full performance of these threshold conditions."

And the U. S. Court of Appeals, Second District, composed of different Judges, decided on March 16, 1961 in the *Matter of Kimoshito and Co. Ltd.* (No Off. Rep.) that under a clause providing for arbitration of any dispute "arising out of or relating to" a contract, a claim of fraudulent inducement would be arbitrable. New York cases are cited in support of the position. While there is no discussion of the Constitutional question, as to whether the party claiming fraud does not have the preliminary right to demand that the Court first determine whether or not he freely contracted to arbitrate, the question is inherent in the case. Thus, the decision by this Court on the subject would serve as a guide for both Federal and State Courts and would lay to rest this perplexing matter.

The question is, therefore, concretely presented as to whether any law which is interpreted as requiring submission to the final judgment of a non-judicial tribunal, even though the contract does not provide for it and the party does not consent to it, is repugnant to the Fourteenth Amendment. To summarize, appellent merely agreed upon arbitration of a "dispute." This does not mean a claim which is fictitious or invalid in law. All it means is that the dispute must be real and factual, and if claimant is to be credited, those facts would sustain a judgment in law. The New York Court of Appeals has now said that even though there be no claim at law, the arbitrators are at liberty to disregard the existing law or to fashion and apply it according to their whim, and, this, notwithstanding that there is no bona fide dispute in law.

Having interpreted these powers to be within the authority of the state statute, such interpretation, we contend, is clearly unconstitutional, and may be reviewed by the Court.

In *Kennard* v. *Louisiana*, 92 U. S. 480, this Court held that there was no deprivation of due process, inasmuch as what was done was "in the due course of legal proceedings, according to rules and forms which have been established for the protection of private rights." It is because we are being deprived of the privilege of a hearing in legal proceedings, according to established rules and forms, that we now make complaint.

Notwithstanding that it was impossible, (prior to discussion in our case) to anticipate the ruling of the New York Court of Appeals, it should be noted that appellant made claim throughout that it was not required by the contract or otherwise to go before a non-judicial tribunal and be bound by its decision, and that hence the claim was clearly presented to the Courts.

This Court said in *Roby* v. *Colehour*, 146 U. S. 153, 159:

> "Our jurisdiction being invoked upon the ground that a right or immunity, specially set up or claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment."

In *Bluefield* v. *Public Service Comm.*, 262 U. S. 668, 689, this Court held that a judgment of the highest Court of a state which upheld an order of the state commission fixing rates may be reviewed by this Court, and that a Public Utility Corporation is entitled, under the due process clause of the Fourteenth Amendment, to the independent judgment of the Court as to both the law and facts.

And finally in *Copperweld* v. *Commission*, 324 U. S. 780, 785, this Court made it explicit

> "But, if violation of the Federal Constitution by the decision of the State Court is, in any case, involved, we have jurisdiction to review the decision on certiorari. (28 U. S. C. 344 C)"

This case therefore bears great importance not only to this appellant alone, whose fundamental rights have been infringed upon, but it also affords the opportunity for clearing the atmosphere for innumerable cases that are currently being presented to both the Federal and State Courts, particularly in the area of New York State.

WHEREFORE, it is respectfully requested that this Honorable Court issue a writ of certiorari herein to the New York State Court of Appeals.

Respectfully submitted,

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Opinion by Judge C. A. Loreto

Matter of Arthur Murray, Inc. (Ricciardi)—The petitioner seeks to stay arbitration. The petitioner franchised the respondent to operate nine dance studios under the naame of "Arthur Murray Dance Studios." The franchise agreement contained an arbitration clause which provided that any controversy or claim arising out of or relating to the agreement would be subject to arbitration in the City of New York. The demand for arbitration states: "Claim is made for the sum of $241,650.00 representing damages sustained by claimant, Joseph H. Ricciardi, by reason of the wilful, arbitrary, and capricious actions of Arthur Murray, Inc., in and [sic] lawfully refusing to consent to the sale and assignment of claimant's interests in his studios operated under the aforementioned agreements. Claim is made for the sum of approximately $10,000.00 representing escrow funds withheld by Arthur Murray, Inc." The petitioner opposes arbitration upon the ground that the agreement also contains the following provision: "26. The Licensee shall not sell, transfer, assign, sub-license, mortgage or pledge the whole or any part of this agreement or any rights or privileges accruing hereunder, to any person, firm, or corporation, without the written consent of the Licensor first had and obtained. * * *" With respect to the claim for $10,000 escrowed funds held by the respondent, the petitioner concedes that it is a proper item for arbitration and makes no objection thereto.

However, with respect to the first item, which represents damages, petitioner maintains it had the absolute right to withhold consent as indicated in paragraph 26 set forth above and that therefore there is no arbitrable issue. This contention cannot be sustained for every contract implies good faith and fair dealing between the

parties to it (Simon v. Elgen, 213 N .Y. 589). The charge is made that the refusal to consent was the result of willful and deliberate acts of bad faith and malicious interference by the petitioner with prospective purchasers. Whether this is so is a matter for the arbitrators to pass upon under the arbitration clause of the agreement, which is broad enough to encompass the claim arising out of said agreement. "All acts of the parties susequent to the making of the contract which raise issues of fact or law are exclusively within the jurisdiction of the arbitration" (Matter of Compagne Francaise des Petroles, 305 N. Y. 588, at 589; Matter of Lipman [Hauser Shellac Co.] 289 N. Y. 76).

The petitioner also raises the question as to whether the proceeding may be instituted by the petitioner without his wife, who was a party to the agreement. In the affidavit the respondent alleges that the wife will be joined as a party. This being so, the respondent will be granted twenty days within which to effectuate such joinder. The motion to stay arbitration is denied. Settle order.

Opinion of New York Court of Appeals

We dissent and vote for modification.

Petitioner seeks to stay arbitration of a dispute allegedly arising out of nine identical franchise agreements. The clear, definite and appropriate language employed by the parties in these agreements and their failure to provide that consent might not be unreasonably withheld, as well as the special nature of the agreements, conferred upon petitioner the right to withhold its consent to their assignment (*Allhusen* v. *Caristo Constr. Corp.*, 303 N. Y. 446; *Sillman* v. *Twentieth Century Fox*, 3 N. Y. 2d 395;

Boskowitz v. *Cohen*, 197 App. Div. 776; *Ogden* v. *Riverview Holding Corp.*, 134 Misc. 149, affd. 226 App. Div. 882; *Glauberman* v. *University Place Apts., Inc.*, 66 N. Y. S. 2d 335, affd. 272 App. Div. 758, mot. for lv. dismd. 297 N. Y. 587; *Nassau Hotel Co.* v. *Barnett & Barse Corp.*, 212 N. Y. 568, affg. 162 App. Div. 381; see also *Weisner* v. *791 Park Ave. Corp.*, 6 N. Y. 2d 426). The rule of good faith (*Simon* v. *Etgen*, 213 N. Y. 589) has no application here whatever.

Accordingly, so much of the dispute as relates to damages allegedly accruing by reason of the arbitrary withholding of consent to the assignments is not arbitrable (*Alpert* v. *Admiration Knitwear Co.*, 304 N. Y. 1, 3; *Matter of General Elec. Co.* [*Elec., Etc., Workers*], 300 N. Y. 262; *Matter of Sarle* [*Sperry Gyroscope*], 4 A. D. 2d 638, 641-642, affd. 4 N. Y. 2d 917; *Matter of Exercycle Corp.* [*Maratta*], 9 N. Y. 2d 329, 334).

The orders of the court below should be modified by granting petitioner's application to stay arbitration insofar as it relates to the claim for damages allegedly arising out of its refusal to consent to the assignment by respondent of the franchise agreements; and except as so modified affirmed, with costs.

* * * * *

Order affirmed, with costs, upon the authority of *Matter of Exercycle Corp.* (*Maratta*), 9 N. Y. 2d 329.

No opinion.

All concur except Froessel, J., who dissents in an opinion in which Van Voorhis, J., concurs.

Opinion in the Matter of the Arbitration Between Exercycle Corporation, Appellant, and James Maratta, Respondent

Fuld, Judge.

In March of 1955, James Maratta entered into an employment agreement with Exercycle Corporation. It provided that "Exercycle employs Maratta as it Vice-President in charge of sales" and that he hereby "shall have general charge and supervision of the selling activities for Exercycle." And, the agreement went on to recite, "Maratta accepts the employment and agrees to devote his best efforts and full time to Exercycle's sales activities". The employment was to continue "until he voluntarily leaves the employ of Exercycle or dies", with Exercycle retaining the right to terminate the contract, if sales fell below specified levels. The agreement further stated that

> "Any dispute arising out of or in connection with this agreement shall be settled by arbitration in accordance with the rules of the American Arbitration Association."

Prior to entering into his agreement with Exercycle, Maratta had been associated with several large and successful enterprises and thereafter became an independent direct sales consultant. In early 1955, he was approached by the then president and controlling stockholder of Exercycle and asked to join that company as a direct sales specialist in improving its business and sales which were then at a low ebb. After a period of negotiation and study, Maratta agreed to give up his work as an independent consultant and, in the words of the contract, "to devote his best efforts and full time to Exercycle's sales activi-

ties". He was fearful, however, that, once he had developed Exercycle's sales to the point where his compensation, based on commissions, was substantial, a new management might attempt to deprive him of the fruits of his efforts. For this reason, he insisted upon and was given a life employment contract.

Maratta worked for the corporation for some four years and, apparently, the fact that he devoted all of his time, his efforts and his imagination to the enterprise, revitalized the company and improved its business. In 1959, differences arose between Maratta and the corporation—control of which had been acquired by a Mr. Little—and Maratta resigned as president, to which office he had succeeded, but continued in his employment under the 1955 arrangement. Some time later, Mr. Little expressed displeasure with Marata's contract and the latter having come to believe that the new management was interfering with his supervision of sales, advised Mr. Little, by letter dated January 12, 1960, that he had "started" to seek employment elsewhere. Three days later, an officer of Exercycle responded. Treating the letter as one of resignation, he expressed regret at Maratta's "decision to terminate [his] relationship with the Exercycle Corporation".

Relying upon the broad arbitration provision in the contract namely, to arbitrate any dispute "arising out of or in connection with" the agreement, Maratta sought arbitration. Exercycle thereupon brought this proceeding for a stay on the ground that the alleged contract of employment "is void and unenforceable in that * * * [it] is lacking in mutuality by obligating Petitioner [Exercycle] to employ Respondent [Maratta] for a definite term i. e. for Respondent's life and permitting Respondent to terminate his employment and said alleged contract at will". Exercycle alsc objcted to the arbitration

on the further ground that, irrespective of its validity, the contract "is no longer in existence" by reason of Maratta's having terminated the contract and resigned as an employee.

The court at Special Term denied the motion for a stay and the Appellate Division affirmed by a three-to-two vote. Both the majority and the minority, to support their respective conclusions, proceeded to construe the contract. It was the majority's view that the contract was one to employ the respondent for life and that the provision "that the employment was to continue until the respondent 'voluntarily leaves the employ of Exercycle or dies' did not as a matter of law make the contract illusory or just an agreement terminable at will." On the other hand, it was the dissenters' opinion that the contract was "illusory" since the employee did not agree to work for life or for any other definite period.

[1] We, too, agree that there should be arbitration, but we reach our conclusion by a route quite different from that taken by the courts below. In our view, the *question whether the contract lacked mutuality* of obligation, depending as it does primarily on a reading and construction of the agreement, and involving, as is obvious from the disagreement amongst the judges of this court and the courts below, substantial difficulties of interpretation, *is to be determined by the arbitrators, not the court.* Once it be ascertained that the parties broadly agreed to arbitrate a dispute "arising out of or in connection with" the *agreement, it is for the arbitrators to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances.*

[2] It has long been this State's policy that, where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in con-

nection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision must go to arbitration. Civil Practice Act, § 1448; see, e. g., Matter of Kelley, 240 N. Y. 74, 79, 147 N. E. 363, 364; Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 298, 169 N. E. 386, 390; Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 43 N. E. 2d 817, 142 A. L. R. 1088; Matter of Terminal Auxiliar Maritima [Winkler], 6 N. Y. 2d 294, 189 N. Y. S. 2d 655. As the court wrote in Matter of Marchant (252 N. Y. at page 298, 169 N. E. at page 391), "Parties to a contract may agree, if they will, that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention."

[3] As exceptions to this general policy, however, we have held that a court will enjoin arbitration (1) where fraud or duress, practiced against one of the parties, renders the agreement voidable (see Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 79, 43 N. E. 2d 817, supra; cf. Matter of Behrens [Feuerring], 296 N. Y. 172, 178, 71 N. E. 2d 454, 456; Matter of Wrap-Vertiser Corp. [Plotnick], 3 N. Y. 2d 17, 163 N. Y. S. 2d 639; Matter of Metro Plan v. Miscione, 257 App. Div. 652, 655, 15 N. Y. S. 2d 35, 37); (2) where there is no "bonafide dispute" between the parties, that is, where the asserted claim is frivolous (see Alpert v. Admiration Knitwear Co., 304 N. Y. 1, 6, 105 N. E. 2d 561, 563; Matter of General Elec. Co. [United Elec. Radio & Mach. Workers], 300 N. Y. 262, 90 N. E. 2d 181; Matter of International Ass'n of Machinists [ler-Hammer], 297 N Y. 519, 74 N. E. 2d 464; Wenger & Co. v. Propper Silk Hosiery Mills, 239 N. Y. 199, 146 N. E. 203); (3) where the performance which is the subject of the demand for arbitration is prohibited by statute (see Matter of Kramer & Uchitelle [Eddington Fabrics Corp.], 288 N. Y. 467, 43 N. E. 2d

493, 141 A. L. R. 1497); or (4) where a condition precedent to arbitration under the contract or an applicable statute has not been fulfilled. See matter of Board of Educ. [Heckler Elec. Co.] 7 N. Y. 2d 476, 199 N. Y. S. 2d 649; Matter of Lipman [Haeuser Shellac Co.] 289 N. Y. 76, 79, 43 N. E. 2d 817, 818, supra; Matter of Cauldwell-Wingate Co. [New York City Housing Auth.], 262 App. Div. 829, 28 N. Y. S. 2d 763, motion for leave to appeal denied 287 N. Y. 853, 38 N. E. 2d 389.

Applying these principles to the case before us, there can be no doubt that Maratta and Exercycle made a contract in which they promised each other to arbitrate any differences which might arise out of or in connection with it. In fact the agreement, entered into in March of 1955, was continued in force, its terms and provisions complied with and carried out, until January, 1960, a period of almost five years. It may hardly be said, therefore, that the making of the present agreement is in issue under section 1450 of the Civil Practice Act.

Nor is the agreement which was entered into "void and unenforceable" within the meaning of Matter of Kramer & Uchitelle (288 N. Y. 467, 43 N. E. 2d 493, supra), as Exercycle contends. In that case, performance of an agreement had been rendered illegal by Federal price control regulations, and we stayed arbitration of the claim, based on a failure to deliver the goods contracted for, on the ground that "controlling public policy barred delivery" at the contract price (288 N. Y. at page 472, 43 N. E. 2d at page 495). The present case is patently dissimilar. In Matter of Kramer, public policy as embodied in a Federal statute forbade the performance which was the subject of dispute and that policy and statute were as binding on the arbitrators as on the courts. No statute or public policy, as reflected in a legislative act, is here involved to render the employment contract unenforceable

and, absent one or the other, it has long been firmly established that arbitrators may disregard the strict and traditional rules of law. (See Fudickar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392, 399-400; Sturges, Commercial Arbitration and Awards [1930], pp. 793-798.) In other words, since there is no statute or public policy which prohibits the performance of a promise to employ one "until he voluntarily [quits] or dies", enforcement of performance by the arbitrators in this case is not rendered unlawful or legally impermissible.

Maratta's claim is not frivolous or insubstantial (cf. e. g., General Elec. Co. [Elec. Workers], 300 N. Y. 262, 90 N. E. 2d 181, supra) and there is no suggestion of fraud (cf. e. g., Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 79, 43 N. E. 2d 817, 818, supra) or an unfulfilled condition precedent to arbitration. Cf., e. g., Matter of Board of Educ. [Heckler Elec. Co.], 7 N. Y. 2d 476, 199 N. Y. S. 2d 649, supra. Under these circumstances, where there is a broad provision for arbitration, such as we have here, arbitration may be had as to all issues arising under the contract. (See Matter of Terminal Auxiliar Maritima [Winkler], 6 N. Y. 2d 294, 298, 189 N. Y. S. 2d 655, 658, supra; Matter of Paloma Frocks [Shamokin Sportswear Corp.], 3 N. Y. 2d 572, 574, 170 N. Y. S. 2d 509, 65 A. L. R. 2d 1317; Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 80, 43 N. E. 2d 817, 819, supra; Fudickar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392, 399-400, supra.)

Exercycle's claim is that no court of law would enforce the promise which it made to employ Maratta for life. Obviously, however, once having agreed to eschew recourse to courts of law and have its disputes with Maratta settled by arbitrators, Exercycle cannot urge, in opposition to arbitration, that a court of law would not enforce the agreement. (Italics ours.) If the issue involved was solely

one of construction or interpretation, it would, without a doubt, be for the arbitrators to decide. The mere fact that its determination involves a mixed question of the agreement's meaning and of law should not lead to a different result. *Whether the issue is one involving interpretation or law* or fact or all three, it is *for the arbitrators* and, as long as they remain within their jurisdiction and do not reach *an irrational result*, they may fashion the law to fit the facts before them. See Matter of National Cash Register Co. [Wilson], 8 N. Y. 2d 377, 383, 208 N. Y. S. 2d 951, 955; Wenger & Co. v. Propper Silk Hosiery Mills, 239 N. Y. 199, 203, 146 N. E. 203, 204, supra; Fudickar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392, 399, supra. So this court said in the Fudickar case (62 N. Y. at page 399):

> "The arbitrator is a judge appointed by the parties; he is by their consent invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matter submitted, and all questions of fact or law upon which the right depends are * * * deemed to be referred to him for decision. The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law."

In short, the issue before us is not whether a court of law would enforce Maratta's claim, but rather whether, as part of their agreement, the parties mutually promised to resolve all controversies "arising out of or in connection with" their agreement by arbitration. If the arbitrators could rationally and legitimately make an award in favor of Maratta, a court is not justified in staying the arbitration even if the claim would not be enforcible at law. In point of fact, we have declined to enjoin an

arbitration even where an arbitrator has been asked to do what a court of law would clearly not do. See Matter of Staklinski [Pyramid Elec. Co.], 6 N. Y. 2d 159, 188 N. Y. S. 2d 541; cf. Matter of Grayson-Robinson Stores [Iris Constr. Corp.], 8 N. Y. 2d 133, 202 N. Y. S. 2d 303. To paraphrase what this court wrote in the Staklinski case, 6 N. Y. 2d at pages 163-164, 188 N. Y. S. 2d at pages 542-543, since the parties agreed to arbitration, it is beside the point to consider whether or not in a case such as the present a court of law would enforce the employer's promise to employ Maratta for life.

Since Exercycle's further claim that Maratta had resigned and thereby brought his employment to an end turns on the construction of the letter written by him and on an appraisal of his conduct, the issue of termination must also be decided by the arbitrators. See Matter of Terminal Auxiliar Maritima [Winkler], 6 N. Y. 2d 294, 298, 189 N. Y. S. 655, 658, supra; Matter of Lipman [Haeuser Shellac Co.], 289 N. Y. 76, 43 N. E. 2d 817, supra.

The order of the Appellate Division should be affirmed, with costs.

FROESSEL, Judge (concurring).

I am in agreement with the majority that there should be an affirmance here. I do not agree, however, with their reasoning that it was error for the Appellate Division to pass on the question of the alleged lack of mutuality of the contract or its illusory nature. The notice of motion for a stay was made upon the ground that the contract "is void and unenforceable on its face". Should there in fact be an absence of mutuality of obligation, or illusoriness—which in essence means an absence of consideration—the purported contract would be invalid and unenforcible, as petitioner contends (Schlegel Mfg. Co. v. Cooper's

Glue Factory, 231 N. Y. 459, 132 N. E. 2d 148, 24 A. L. R. 1348; Bintz v. City of Hornell, 268 App. Div. 742, 747, 53 N. Y. S. 2d 803, 808, affirmed 295 N. Y. 628, 64 N. E. 2d 654; 1 Corbin, Contracts, §§ 152, 145). In that case, as Professor Corbin puts it, no "contract was made" (p. 499)—it never came into existence. Determination of that issue, under well-established principles, is a threshold matter for determination by the court.

The rule is succinctly stated in Matter of Kramer & Uchitelle (Eddington Fabrics Corp.), 288 N. Y. 467, 471, 43 N. E. 2d 493, 495, as follows: "Arbitration clauses in contracts such as those under consideration are directed solely to the remedy—not to the validity or existence of the contract itself. Thus, proceedings to enforce arbitration under article 84 of the Civil Practice Act *presuppose the existence of a valid and enforceable contract* at the time the remedy is sought. (Matter of Berkovitz v. Arbib & Houlberg, Inc., 230 N. Y. 261, 271, 130 N. E. 288; Mulji v. Cheong Yue Steamship Co., Ltd. [1926], A. C. 497.) Seasonable challenge may be made to the court to the existence of such a contract by one who stays out of the arbitration and * * * *the issue is properly determinable by the court as matter of law.* Matter of Finsilver, Still & Moss, Inc., v. Goldberg, Maas & Co., 253 N. Y. 382, 171 N. E. 579, 69 A. L. R. 809." (Emphasis supplied.)

In Matter of Lipman (Haeuser Shellac Co.), 289 N. Y. 76, 43 N. E. 2d 817, 142 A. L. R. 1088, we acknowledged that the issue of "whether the contract never came into existence" is for the court (id. at page 79, 43 N. E. 2d at page 819); and in Matter of Sarle (Sperry Gyroscope Co.), 4 A. D. 2d 638, 168 N. Y. S. 2d 228, 230, affirmed 4 N. Y. 2d 917, 174 N. Y. S. 2d 665, the distinction between questions of "performance under the contract" and "the contract itself" was stressed (4 A. D. 2d at page 640, 168 N. Y. S. 2d at page 230), the former being for the arbitrators and the latter for the court (see, also, Matter of

Wrap-Vertiser Corp. [Plotnick], 3 N. Y. 2d 17, 20, 22, 163 N. Y. S. 2d 639, 641, 642).

The logic of this rule is forcefully stated in Finsilver, Still & Moss v. Goldberg, Maas & Co., 253 N. Y. 382, at pages 390-391, 171 N. E. 579, at page 582, where Chief Judge Cardozo, writing for a unanimous court, said: "If in truth there is *no contract at all or* none calling for arbitration, the self-constituted tribunal is a nullity, without power to bind or loose by force of its decision. * * * In the absence of a *contract* expressing a consent to arbitrate, an award by an arbitrator is an act of usurpation." (Emphasis supplied.)

Simply put, the legal existence of the arbitral tribunal depends on contract. It is from that agreement between the parties that their very being, or jurisdiction and power to act, derives. Unless such contract, when seasonably challenged, is declared valid and enforcible, therefore, the arbitral tribunal can never legally come into being. As the court stated in Gruen v. Carter, 173 Misc. 765, 766, 18 N. Y. S. 2d 990, 991, 992, affirmed 259 App. Div. 712, 18 N. Y. S. 2d 1023, motion for reargument denied 259 App. Div. 813, 20 N. Y. S. 2d 397), "It is not for the arbitrators to decide upon the validity of the very agreement upon which their own status as arbitrators is predicated"; or, as Judge Burke well put it in Matter of Wrap-Vertiser (Plotnick) (3 N. Y. 2d 17, 22, 163 N. Y. S. 2d 639, 643, supra), "'Obviously, parties cannot agree, in an invalid contract, to arbitrate the validity of the contract'." *

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* The majority did not disagree with this premise in the Wrap-Vertiser case. Judge Van Voorhis there stated: "Even if he had rescinded or asked for rescission, such an issue would have had to have been decided in court *before* it could be known that an agreement existed supplying a foundation for the jurisdiction of the arbitrators" (3 N. Y. 2d at page 20, 163 N. Y. S. 2d at page 641; italics supplied).

The majority in this case, without purporting to overrule these well-established principles and their underlying logic, state the applicable rule to be that, "*where parties enter into an agreement and, in one of its provisions, promise that any dispute arising out of or in connection with it shall be settled by arbitration, any controversy which arises between them and is within the compass of the provision, must go to arbitration*". This statement of the allegedly established law in this State contains its own refutation. If it has not been determined whether "an agreement" was entered into, what basis is there for the existence of the arbitrators and their jurisdiction in the matter? Again, if mutuality of obligation is lacking, there is no agreement—or, as Chief Judge Cardozo stated in Finsilver, supra, "no contract at all"—and the existence of such an agreement when seasonably challenged must be determined preliminarily by a court of law in order to legally constitute the arbitral tribunal, and afford them jurisdiction over the controversy between the parties arising out of the agreement.

Conceivably, the only rationale which can justify the position of the majority is that the arbitration clause is an agreement separate and apart from the main agreement, supported by its own consideration. But the majority does not proceed on that basis. They recognize as our decisions from Finsilver through Matter of Sarle, supra, clearly demonstrate that in this jurisdiction the promise to arbitrate is considered to be but a clause or part of the over-all contract, for they state there is "an agreement", and "one of *its provisions*" (emphasis supplied) contains a "promise" to arbitrate. Consequently, if the over-all contract is lacking in consideration—i. e., illusory or lacking in mutuality—or is otherwise invalid, it is unenforcible, and the right to arbitrate, which is a part of it and contingent thereon, falls. Unless we determine this preliminarily

as a matter of law, the jurisdiction of the arbitrators has not been established. If there be no contract, they are a "self-constituted" "nullity".

It is no answer, as the majority state, that, since "the question whether the contract lacked mufuality of obligation" depends "primarily on a reading and construction of the agreement" and invokes "substantial difficulties of interpretation", a basis for arbitration has been established. It is rather our function to resolve these questions since they bear on the validity, enforcibility and existence of the contract, upon which the right to arbitrate and the jurisdiction of the arbitrators in turn depend. If no agreement conferring that right and jurisdiction exists, there is nothing for the arbitrators to read and construe; and the happenstance that the question may be difficult does not permit us to pass the problem on to the arbitral tribunal—which as yet has no legal being.

Inasmuch as I am in agreement with the majority of the Appellate Division that the contract here at issue is not lacking in mutuality of obligation, the arbitrators may be properly constituted and adjudicate the controversies between the parties arising out of the agreement, and on that basis I would affirm.

(Van Voorhis concurs.)

Dye, Judge (dissenting).

In dealing with controversies concerning the enforcibility of arbitration, the initial question is whether the underlying contract is valid and enforcible. If it is, then we may pass to the question of whether the contract, by its terms, makes provision for the settlement of disputes arising thereunder by arbitration. If not, then we do not

enforce arbitration since its vitality depends, in the first instance, on the existence of a valid contract (Civ. Prac. Act, art. 84, § 1450). Whether the term "contract" refers to the entire agreement in which the provision for arbitration is contained, or it refers, by a loose construction of that term, solely to the clause permitting arbitration is at the heart of this controversy.

While there is a school of thought favoring the view that the power of the court is limited to a determination of whether or not an agreement to arbitrate has been made (cf. 36 Yale L. J. 866; Note, 24 N. Y. U. L. Q. Rev. 429, our decisions, until now, have uniformly held that an arbitration clause fails if a contract was never made (Matter of Wrap-Vertiser Corp. [Plotnick], 3 N. Y. 2d 17, 163 N. Y. S. 2d 639; Finsilver, Still & Moss v. Goldberg, Maas & Co., 253 N. Y. 382, 171 N. E. 2d 579; Matter of Levinsohn Corp. [Joint Bd. of Cloak Makers' Union], 299 N. Y. 454, 87 N. E. 2d 510; 38 Cornell L. Q. 391; 6 Corbin, Contracts, § 1444).

Here, there is a real dispute between the parties, concerning the existence of a contract. This, under the authorities, is for the court to determine before proceeding to the question of arbitration. On its face, the ability of this contract to survive the scrutiny of a court of law is indeed dubious. It lacks mutuality and is illusory. It provides that the employment of Maratta shall continue until he voluntarily leaves the employ of Exercycle or dies. Maratta is thus privileged in language which includes no restrictive conditions to quit his employment without obligation to respond in damages. Exercycle's promise is to retain Maratta for as long as he wishes to continue, provided only that he maintain sales above a specified minimum. Maratta promised to devote his full time and best efforts to the business. He promised nothing with respect to continuation of employment, for he was at liberty to leave voluntarily at any time.

When Maratta's promise to put forth his best efforts on a full-time basis is read together with the option to quit at any time, it becomes an unenforcible promise—and amounts to no more than a mere gratuitous statement, furnishing the company with nothing more than a hope that it will come about and as such is an illusion of a promise. So viewed, the entire agreement is unenforcible for lack of mutuality of obligation. It follows then that all the provisions contained therein, including the arbitration clause, are likewise unenforcible.

The order of the Appellate Division should be reversed and the motion to stay arbitration should be granted, with costs.

DESMOND, C. J., and BURKE and FOSTER, JJ., concur with FULD, J.